



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Via Facsimile and First Class Mail

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JUL 25 2011

Jason Torchinsky, Esq.
Holtzman Vogel, PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186

RE: MUR 6358
Americans for Prosperity

Dear Mr. Torchinsky:

By letter dated September 2, 2010, the Federal Election Commission notified your client, Americans for Prosperity, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On July 19, 2011, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe Americans for Prosperity violated 2 U.S.C. §§ 441b, 433, 434, or 441a. Accordingly, the Commission closed its file in this matter.

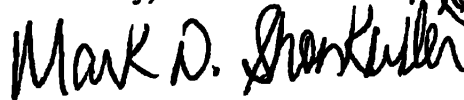

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

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Jason Torchinsky, Esq.
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If you have any questions, please contact Thomas J. Andersen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4
5 **RESPONDENT: Americans for Prosperity**

MUR 6358

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7 **I. INTRODUCTION**

8 This matter was generated by a complaint filed with the Federal Election Commission by
9 Dwight Pelz, alleging violations of the Federal Election Campaign Act of 1971, as amended
10 ("the Act"), by Americans for Prosperity ("AFP").

11 **II. FACTUAL AND LEGAL ANALYSIS**

12 The complaint in this matter alleges that AFP coordinated an August 2010 television
13 advertisement with Representative Jaime Herrera Beutler (f/k/a Jaime Herrera) and her principal
14 campaign committee, Jaime for Congress (f/k/a Jaime Herrera for Congress) and Keith Bundy, in
15 his official capacity as treasurer ("the Committee").¹ The complaint alleges that individuals
16 closely associated with Herrera Beutler and her campaign appeared in the advertisement, thus
17 satisfying the conduct prong of the Commission's coordination regulations. The complaint
18 asserts that AFP's payment for the advertisement, which criticized Herrera Beutler's opponent,
19 Denny Heck, constituted an in-kind contribution in excess of \$1,000, and, therefore, AFP was
20 required to register and report to the Commission as a political committee. In response, the
21 Respondents argue there was no coordination because there are no facts that satisfy the conduct
22 standard of the Commission's regulations.

23 Upon review of the complaint, responses, and other available information, there appears
24 to be no basis for concluding that AFP coordinated with Herrera Beutler or her campaign

¹ After the complaint and responses were filed in this matter, Jaime Herrera for Congress changed its name to Jaime for Congress, filing a Statement of Organization to that effect on December 20, 2010. Around the same time, the candidate, who is now a member of Congress representing Washington's 3rd Congressional District, appears to have changed her name from Jaime Herrera to Jaime Herrera Beutler. See <http://wherrerbeutler.house.gov/>; Kyung M. Song, *Jaime Herrera takes husband's name, belatedly*, THE SEATTLE TIMES, Dec. 22, 2010.

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regarding the advertisement at issue, or that AFP was required to register and report as a political committee.

A. Factual Background

AFP is organized under section 501(c)(4) of the Internal Revenue Code; it registered as a non-profit corporation in the District of Columbia in 2004, but is not registered with the Commission as a political committee. <http://americansforprosperity.org/about/legal>; <http://mblr.dr.gov/corp/lookup/status.asp?id=37265>. AFP states that it is “committed to educating citizens about economic policy and mobilizing those citizens as advocates in the public policy process.” <http://americansforprosperity.org/about>. AFP maintains that it has 1.6 million activists in all 50 states, including 31 state chapters. *Id.* In 2008, AFP reported receipts of \$7,012,051 in its tax returns filed with the Internal Revenue Service. AFP also reported expenses for communications, advertisements, and media totaling \$3,063,611, which comprised 43 percent of its total expenses that year. AFP filed seventeen electioneering communications reports with the Commission during the 2010 election cycle that disclosed \$1,311,800.11 in disbursements for production and placement of television and radio spots.

Jaime Herrera Beutler was a candidate in the 2010 general election for Washington’s 3rd Congressional District, and Jaime for Congress is her principal campaign committee. Her main opponent in the election was Denny Heck. The television advertisement at issue was reportedly broadcast in the congressional district from approximately August 18 to 24, 2010, and reportedly cost AFP \$180,390. *See* Kathy Durbin, *Conservatives launch TV ad attacking 3rd District Democratic candidate Heck*, THE (Vancouver, WA) COLUMBIAN, Aug. 20, 2010; *see also* <http://www.americansforprosperity.org/081910-tell-denny-heck-we-need-new-leadership>. The advertisement was 30 seconds long.

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1 The complaint alleges that the ad “features several individuals believed to be closely
2 associated with [Herrera Beutler] and her campaign,” including Aaron Christopherson, Keath Huff,
3 and Ryan Hart. Complaint at 2. The complaint states that Christopherson, Huff, and Hart are each
4 identified on Herrera Beutler’s campaign website as endorsing her 2010 candidacy.² The complaint
5 states that Christopherson served as Herrera Beutler’s campaign manager when she ran for re-
6 election to the Washington state legislature in 2008. The complaint further states that Huff and Hart
7 “are also members of several Republican organizations with close ties to [Herrera Beutler’s]
8 campaign.” Complaint at 2. The complaint references a website identifying Huff as a “member of,”
9 *inter alia*, the Republican National Committee, the Cowlitz County Republican Central Committee,
10 and the Cowlitz County Young Republicans,” *see* [http://vote-](http://vote-wa.org/Intro.aspx?State=WA&Id=WAHuffKeath)
11 [wa.org/Intro.aspx?State=WA&Id=WAHuffKeath](http://vote-wa.org/Intro.aspx?State=WA&Id=WAHuffKeath), and another website listing Hart as a State
12 Committeeman for the Clark County (Washington) Republican Party. *See*
13 <http://clarkcountygop.org/content.htm?cid=28>. The complaint further states that Huff has “recently
14 identified himself as a ‘friend’ and ‘supporter’ of” Herrera Beutler, Complaint at 2, citing a website
15 in which Huff appears to have posted a letter containing phrases such as “my friend Jaime Herrera.”
16 *See* <http://libertyteeth.com/?tag=tea-party>.

17 The complaint contends that it is “implausible” that Herrera Beutler’s “friends, former
18 employees, party supporters, surrogates, and endorsers would have all agreed to appear in the AFP
19 advertisement without the assent, substantial discussion or material involvement of” Herrera Beutler
20 or her campaign. Complaint at 3. The complaint concludes that, assuming there was coordination,
21 AFP made and, Herrera Beutler and the Committee accepted, an illegal unreported in-kind

² The web page referenced in the complaint is no longer available; however, an archived web page from October 2010 contains a list of “Individuals” who endorsed Herrera Beutler, including “Ryan & Diane Hart, Vancouver residents,” and “Keath Huff, Longview resident.” *See* <http://replay.web.archive.org/20101028215212/http://www.jaimeherrera.com/endorsements.html>.

1 contribution. The complaint alleges that the coordination resulted in AFP making an expenditure
2 exceeding \$1,000, requiring it to register as a political committee with the Commission.

3 In its response, AFP states that “[n]ot only was there no coordination (and hence, no ‘in-kind
4 contribution’ to the . . . campaign), Americans for Prosperity was not formed and is not operated for
5 the purpose of influencing federal elections and any contributions received by the group have not
6 been for that purpose.” AFP Response at 4. AFP contends that the complaint “provides no evidence
7 or information suggesting that AFP or the candidate engaged in any of the conduct described in the
8 conduct standards in 11 C.F.R. § 109.21(d).” *Id.* at 3. AFP states that none of the three individuals
9 identified in the complaint are or were agents of the candidate, noting that two years have passed
10 since Aaron Christopherson managed Herrera Beutler’s campaign for non-federal office. According
11 to the complaint, Christopherson’s previous association with Herrera Beutler, as well as the ties of
12 the other two individuals to Republican organizations, have no legal significance, as there is no
13 evidence of any coordination by or through any of these individuals. AFP further states that an
14 “internal review” of this matter found “no evidence” of “assent, substantial discussion or material
15 involvement.” *Id.*

16 AFP provided several documents in support of its response, including information about
17 internal firewall policies that it set up to “prevent the sharing or discussion of AFP’s plans and
18 activities with any federal candidate or political party committee.” AFP Response at 3. AFP claims
19 that its firewall policies complied with Commission rules “and were acknowledged and understood
20 by all of the personnel involved in the production of this advertisement.” *Id.* AFP provided a copy
21 of a firewall policy signed by the president of the media vendor that produced the ad; the document
22 states, *inter alia*, that the vendor “is prohibited from discussing AFP’s issue advocacy
23 communications with a candidate or campaign or political party committee, or the agents of these

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1 groups.” Att. A of AFP Response. AFP’s internal policy, Att. B of AFP Response, states that “AFP
2 directors, officers, and employees are prohibited from discussing AFP’s issue advocacy program
3 with any . . . candidate . . . or candidate’s staff and agents. Similarly, no AFP director, officer, or
4 employee may have a discussion with a federal candidate [or agent] about the federal candidate’s . . .
5 plans, projects, activities, or needs.”

6 AFP submitted affidavits from Kirby Wilbur and Kathy McDonald, the two AFP staffers it
7 maintains were involved in the production of the advertisement. Wilbur states that he was asked by
8 AFP’s media vendor to contact local residents to appear in the ad, and McDonald states that she was
9 contacted by Wilbur. Atts. C & D of AFP Response. McDonald states that she contacted
10 Christopherson and was aware he had managed Herrera Beutler’s 2008 non-federal campaign, “but
11 to the best of my knowledge he was not involved” in her current campaign. *Id.* The affidavits of
12 Wilbur and McDonald similarly state that other individuals they contacted – including Keath Huff
13 and Ryan Hart – were not, to the best of their knowledge, involved in any congressional campaigns
14 in the district. *Id.* AFP also submitted an affidavit from the vendor employee who was tasked to
15 create the advertisement; he states that he was aware of, and abided by, AFP’s firewall policy. Att.
16 E of AFP Response.

17 The Committee’s response asserts that the conduct standard is not satisfied because, *inter*
18 *alia*, Christopherson “has been neither an employee nor an independent contractor of [Herrera
19 Beutler] in the last 120 days, or at any time in connection with her federal campaign.” Committee
20 Response at 2. In addition, with one exception, no campaign vendors have performed the services
21 described in the Commission’s common vendor regulation. *Id.* The lone common vendor (who was
22 not the same vendor who produced the ad at issue) provided services to AFP under the terms of
23 AFP’s firewall policy and in accordance with that vendor’s own firewall policy. *Id.* at 2-3. The

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1 Committee submitted a sworn declaration from Herrera Beutler's 2010 campaign manager (and also
2 treasurer around the time the AFP ad was run), Casey Bowman, who states that he was responsible
3 for the Committee's public communications and overall campaign strategy. Att. 1 of Complaint.
4 Bowman asserts that none of the individuals identified in the complaint had any role in campaign
5 operations, plans, communications, or strategy, and that he had no such discussions with them. *Id.*
6 He acknowledges that they are listed as endorsers on the campaign's web page, but claims that the
7 candidate and her campaign did not request or suggest that AFP produce the ad or that AFP contact
8 anyone who had endorsed her. *Id.* Bowman also states that the candidate and her campaign were
9 not involved in any decisions by AFP concerning the ad, and that, based on his own inquiry, the
10 candidate and the campaign have not had any communications with anyone identifying themselves
11 as a representative or agent of AFP. *Id.*

12 B. Legal Analysis

13 The central issue in this matter is whether the television advertisement paid for by the AFP
14 was coordinated with Herrera Beutler or her campaign. The Act prohibits any corporation from
15 making a contribution to a political committee and similarly prohibits candidates and political
16 committees from accepting or receiving such contributions. 2 U.S.C. § 441b(a). The Act provides
17 that an expenditure made by any person "in cooperation, consultation, or concert, with, or at the
18 request or suggestion of," a candidate or his authorized committee or agent is a contribution to the
19 candidate. See 2 U.S.C. § 441a(a)(7)(B)(i); 11 C.F.R. § 109.20(a). Treasurers of political
20 committees are required to disclose all contributions, including in-kind contributions. 2 U.S.C.
21 § 434(b).

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1. Coordination

A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing when the communication is (1) paid for, in whole or part by a person other than that candidate, authorized committee, or political party committee; (2) satisfies at least one of the content standards³ described in 11 C.F.R. § 109.21(c); and (3) satisfies at least one of the conduct standards described in 11 C.F.R. § 109.21(d). 11 C.F.R. § 109.21(a)(1)–(3).

In this matter, the first prong of the coordinated communication test is satisfied because AFP is a third-party payor. See 11 C.F.R. § 109.21(a)(1). The second prong of this test, the content standard, appears to be satisfied because the advertisement at issue is a public communication that refers to a clearly identified candidate for federal office (Denny Heck), and was broadcast “in the clearly identified candidate’s jurisdiction” within 90 days of the November 2, 2010 general election. 11 C.F.R. § 109.21(c)(4)(i). A “public communication,” is defined as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general political advertising.” 11 C.F.R. § 100.26. AFP’s response states that it does not dispute that it paid for the advertisement and that the communication thus satisfies the payment prong; the response further states that AFP does not dispute that the communication satisfies a content standard in 11 C.F.R. § 109.21(c).

³ The Commission recently revised the content standard in 11 C.F.R. § 109.21(c) in response to the D.C. Circuit’s decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). The Commission added a new standard to the content prong of the coordinated communications rule. 11 C.F.R. § 109.21(c)(5) covers communications that are the functional equivalent of express advocacy. See *Explanation and Justification for Coordinated Communications*, 75 Fed. Reg. 55947 (September 15, 2010). The effective date of the new content standard is December 1, 2010, after the events at issue in this matter. The new standard would not change the analysis in this matter.

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1 However, the conduct prong is not satisfied in this matter. The conduct prong is satisfied
2 where any of the following types of conduct occurs: (1) the communication was created,
3 produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the
4 candidate or his campaign was materially involved in decisions regarding the communication;
5 (3) the communication was created, produced, or distributed after substantial discussions with
6 the campaign or its agents; (4) the parties contracted with or employed a common vendor that
7 used or conveyed material information about the campaign's plans, projects, activities or needs,
8 or used material information gained from past work with the candidate to create, produce, or
9 distribute the communication; (5) the payor employed a former employee or independent
10 contractor of the candidate who used or conveyed material information about the campaign's
11 plans, projects, activities or needs, or used material information gained from past work with the
12 candidate to create, produce, or distribute the communication; or (6) the payor republished
13 campaign material. *See* 11 C.F.R. § 109.21(d).

14 The complaint contains no specific information indicating that any of the conduct
15 standards were satisfied in this matter, and there is no available information that supports such a
16 conclusion. Instead, the complaint argues that it is "inplausible" that Herrera Beutler's friends,
17 supporters, and former employees, some of whom were identified on an extensive endorsement
18 list on the campaign website, would have agreed to appear in the AFP advertisement without the
19 involvement of the Committee or its agents. However, there is no information indicating that the
20 Committee or its agents requested or suggested that AFP create the ad, participated in any
21 discussion about the ad on behalf of the Committee, were materially involved in its creation or
22 dissemination as Committee agents, or otherwise informed AFP about the campaign's plans,
23 projects, activities, or needs. Even assuming that Aaron Christopherson was formerly employed

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1 by Herrera Beutler, this activity occurred far more than 120 days prior to the airing of the ad, and
2 there is no information suggesting that Christopherson was ever employed by AFP's media
3 vendor. See 11 C.F.R. § 109.21(d)(5)(i). There is also no basis on which to conclude that the ad
4 constituted republication of campaign material, as the available information does not indicate
5 that the content had been used in any Committee communications.

6 Moreover, the Respondents have provided sworn affidavits from key individuals
7 specifically refuting the allegation that the advertisement was created at the request or
8 suggestion of, with the material involvement of, or after substantial discussions with, the
9 candidate or his agents, thereby negating the existence of conduct at 11 C.F.R. § 109.21(d)(1)-
10 (3). In addition, AFP has provided documentation of a firewall policy that existed at the time of
11 the communication and appears to satisfy the safe harbor criteria at 11 C.F.R. § 109.21(h); i.e.,
12 the policy appears to have been designed and implemented to prohibit the flow of information
13 between its employees and consultants and those of federal candidates, and it was distributed to
14 relevant employees and consultants. Indeed, the AFP employees most closely involved in the
15 production of the ad had each signed the policy document several months prior to the broadcast
16 of the ad (copies of which are appended to AFP's response).

17 Given the Respondents' specific denials, the speculative nature of the complaint, and the
18 absence of any other information suggesting coordination, the conduct prong of the coordinated
19 communications regulations has not been met. Thus, there appears to be no resulting violation of the
20 Act. Therefore, there is no reason to believe that Americans for Prosperity violated 2 U.S.C. § 441b.

21 2. AFP's Political Committee Status

22 Complainant's allegation that AFP was required to register with the Commission as a
23 political committee, and failed to abide by applicable contribution limits, is based on the assertion

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1 that the advertisement was coordinated and therefore constituted a contribution or expenditure in
2 excess of \$1,000 that satisfied the threshold requirement for political committee status. *See* 2 U.S.C.
3 § 431(4)(A).

4 The Act defines a “political committee” as any committee, club, association, or other group
5 of persons that receives “contributions” or makes “expenditures” for the purpose of influencing a
6 federal election which aggregate in excess of \$1,000 during a calendar year. *Id.* An organization
7 will not be considered a “political committee” unless its major purpose is “Federal campaign activity
8 (*i.e.*, the nomination or election of a Federal candidate).” Political Committee Status: Supplemental
9 Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007). *See Buckley v. Valeo*, 424
10 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 262 (1986).
11 Political committees must register with the Commission and abide by the Act’s reporting provisions
12 and contribution limitations. 2 U.S.C. §§ 433, 434, 441a.

13 Given that the advertisement at issue does not appear to have been coordinated, and thus did
14 not constitute an in-kind contribution to the Committee, the predicate for this allegation does not
15 appear to be satisfied. Therefore, there is no reason to believe that Americans for Prosperity violated
16 2 U.S.C. §§ 433, 434, or 441a.

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